In the

Supreme Court of the United States

October Term, 1936.

No. 217.

MIDLAND REALTY COMPANY, *Appellant,*

vs.

KANSAS CITY POWER & LIGHT COMPANY, *Appellee.*

SUGGESTIONS IN OPPOSITION TO APPELLANT'S PETITION FOR A REHEARING.

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Appellant's petition for rehearing is bottomed upon six propositions, all of which were thoroughly briefed and argued by both sides prior to the court's opinion. They are, in order:

1. Appellant had no notice of the filing of the schedule of rates effective August 1, 1917, and therefore it could not have attacked it.

2. The mere filing of a schedule of rates, without any affirmative act of the Public Service Commission approving the new rates, cannot supersede contract rates.

3. The appellant was under no duty to object to the newly filed schedule of rates so long as appellee did not discontinue service.

4. The courts of many states other than Missouri have placed a construction upon their own statutes which is different from that placed upon the Missouri statutes by the Supreme Court of Missouri.

5. By virtue of Section 5208, R. S. Mo. 1929, the legislature expressly preserved contracts existing at the time the Public Service Commission law was enacted and therefore it was not unlawful for appellee to charge different rates to different customers.

6. In order for commission rates to supersede contract rates, there must be a finding by the commission that public necessity and public welfare requires it.

We beg leave to discuss these points quite briefly.

1.

Appellant strenuously contends that the court is in error when, in its opinion, it says "Under the challenged statute, defendant had opportunity to support the contract rates and to test before the commission and in the state supreme court—as others did—the validity of the filed schedules. (Citing cases, statutes.) It failed to do so." Appellant contends it could not have attacked the filed rates (and thus supported the contract rates) because it had no actual or constructive notice of the filing of a new schedule of rates.

The answer to this contention now is the same as it was when appellant raised the same question in its brief. We said then (appellee's brief, pp. 33, 34) "The Public Service Commission Act provides that any interested

party may intervene in any proceeding before the commission. Section 5232, R. S. Mo. 1929, Vol. I, p. 1472. Many customers did intervene in cases 1353 and 1615. * * * Since appellant did not avail itself of the opportunity of being heard by the commission in either of the proceedings, it should not now be rewarded therefor."

Appellant apparently loses sight of the express provisions of Section 5190, R. S. Mo. 1929 (Section 12, Vol. I, p. 1448), when it complains it had no actual *or constructive* notice of the new schedule. Said section provides, in part:

> "* * * no change shall be made in any rate * * * except after thirty days' notice to the commission, *and publication for thirty days* as required by order of the commission * * *" (emphasis supplied).

Obviously the *publication for thirty days* was intended to apprise, by constructive notice, all persons (other than the utility and the commission) who might be interested.

2.

Appellant's next contention is that the mere filing of a schedule of rates, without any affirmative act of the commission approving the new rates, cannot supersede contract rates.

This proposition was briefed by appellant (Brief, pp. 11-22) and by appellee (Brief, pp. 24-32).

That the court considered the contention and ruled it adversely to appellant is evidenced by the court's language, "It is clear that, as against those (rates) specified in the contract here involved, the rates first filed by plain-

tiff * * * have the same force and effect as if directly prescribed by the legislature (citing cases)."

Appellant presents no new argument for the reconsideration of the proposition and we will not burden the court with a repetition of our argument as presented in the brief.

3.

It is claimed by appellant that this cause should be reheard because the court was in error in holding the burden was on appellant to attack the new rates. The reason assigned is that appellee did not discontinue service; therefore, appellant was under no duty to act.

This point was likewise briefed by both parties before the argument (Appellant's Brief, pp. 23, 25; Appellee's Brief, p. 34).

It was considered by the court and ruled adversely to appellant in this language, "Defendant was not injured by plaintiff's failure to withhold service * * *. It cannot derive any advantage from refusal to pay."

There is no valid reason why appellant could not have objected, within thirty days before August 1, 1917, to the taking effect of the new schedule as to it, upon the ground that it had a contract. Likewise, there is no valid reason why it could not have intervened (as many customers did) in case No. 1353 as to the second schedule.

Appellant is presumed to have known that unless it did so object or intervene, the new rates upon their effective dates would supersede the contract rates.

4.

Appellant also complains that courts of states other than Missouri have construed their own statutes differently than has the Supreme Court of Missouri. We do not deny this. But as this Court said in the opinion in the case at bar, "These questions are to be decided upon the construction that the state supreme court put upon the statute."

The state supreme court held the contract rates were superseded by the filed and published rates and this Court found that decision did not violate the Federal Constitution because the proceedings employed in the annulment of the contract rates were orderly, were with due process of law. Appellant failed to make use of the remedies accorded by the very statute it now attacks. This being so, what difference does it make that courts of other states have held their statutes are not of the same effect as the Missouri statute?

5.

Appellant again presents to the Court the same argument as was presented in its brief (pp. 28-32) and answered by appellee in its brief (pp. 37-41), namely, the legislature by Section 5208, R. S. Mo. 1929, expressly "* * * inhibited the abrogation of the contract in question" (Appellant's Brief, p. 10).

It was made unlawful by Section 5190 for a utility to receive a greater or less compensation for its service than the rates applicable to such service as specified in its schedule filed and in effect at the time. If the Supreme Court of Missouri had not interpreted Section 5208 the

way it did, the plain provisions of Section 5190 would have been nullified.

6.

Finally, appellant contends that a contract rate cannot be superseded by a filed rate without a showing that public welfare and public necessity requires it. This has never been the law in Missouri. It has been held in Missouri, without exception, that a schedule of rates filed and published in accordance with Section 5190 acquires the force and effect of law and that if contract rates come in conflict with filed and published rates, the former are "of no vitality." (See cases cited in appellant's brief, pp. 10-24.) Since the statutes of Missouri require no such showing, none need be made.

Respectfully submitted,

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